

few minutes—the Court demonstrated a disconcerting tendency to rely on the laws of foreign governments and even treaties in the application and enforcement of U.S. law. This is a trend that did not start with the *Roper* case, but I did want to mention it in that connection.

But if the U.S. Supreme Court is not going to look to the laws of the United States, including the fundamental law of the United States, which is the Constitution, but interpreting what is and is not constitutional under the U.S. Constitution by looking at what foreign governments and foreign laws have to say about that same issue, I fear that bit by bit and case by case the American people are slowly losing control over the meaning of our laws and the Constitution itself. If this trend continues, foreign governments may have a say in what our laws and our Constitution mean and what our policies in America should be.

Let me digress a second to say this is as current as the daily news. As a matter of fact, I saw in the *New York Times* on April 2 an article concerning Justice Ginsburg, a member of that five-member majority in the *Roper* case. The headline is: “Justice Ginsburg Backs Value of Foreign Law.” Reading from this story, written by Anne Kornblut, it says:

In her speech, Justice Ginsburg criticized the resolutions in Congress and the spirit in which they were written.

She is referring to a resolution I have filed, and I sent out a “dear colleague” today expressing concerns about this issue. But she said:

Although I doubt the resolutions will pass this Congress—

I don’t know where she gets her information. I think there is a lot of positive sentiment in favor of what the resolution says, and I will talk about that in a minute.

Although I doubt the resolutions will pass this Congress, it is disquieting that they have attracted sizable support.

I am a little surprised that a sitting U.S. Supreme Court Justice would engage in a debate about a current matter, which has yet to be decided by the Senate, which is a resolution expressing concern about the use of foreign laws and treaties to interpret what the U.S. Constitution should mean. I am a little surprised by it.

In a series of cases over the past few years our courts have begun to tell us that our criminal laws and our criminal policies are informed not just by our Constitution and by the policy preferences and legislative enactments of the American people through their elected representatives, but also by the rulings of foreign courts. I understand it is hard to believe, and most people listening to what I am saying are asking themselves: Could this be true? Is it possible? I know it is hard to believe, but in a series of recent cases, including the *Roper* case, the U.S. Supreme Court has actually rejected its own prior decisions in part because a for-

eign government or court has expressed disagreement with the conclusion they had reached.

Until recently the U.S. Supreme Court had long held that under appropriate safeguards and procedures, the death penalty may be imposed by the States regardless of the IQ of the perpetrator. The Court had traditionally left this issue untouched as a matter for the American people and each of their States to decide, as the Court said in a case called *Penry v. Lynaugh* in 1989. Yet because some foreign governments had frowned upon that ruling, the U.S. has now seen fit to take that issue away from the American people entirely. In 2002, in a case called *Atkins v. Virginia*, the U.S. Supreme Court held that the Commonwealth of Virginia could no longer apply its criminal justice system and its death penalty to an individual who had been duly convicted of abduction, armed robbery, and capital murder because of the testimony that the defendant was mildly mentally retarded. The reason given for this reversal of the Court’s position that it had taken in 1989 to 2002? In part it was because the Court was concerned about “the world community” and the views of the European Union.

Take another example. The U.S. Supreme Court had long held that the American people in each of the States have the discretion to decide what kinds of conduct that have long been considered immoral under longstanding legal traditions should or should not remain illegal. In *Bowers v. Hardwick* in 1986, the Court held that it is up to the American people to decide whether criminal laws against sodomy should be continued or abandoned. Yet once again because foreign governments have frowned upon that ruling, the U.S. Supreme Court saw fit in 2003, in *Lawrence v. Texas*, to hold that no State’s criminal justice system or its criminal justice laws could be written in a way to reflect the moral convictions and judgments of their people.

The reason given for this reversal from 1986 to 2002? This time the Court explained that it was concerned about the European Court of Human Rights and the European Convention on Human Rights.

I have already mentioned the case of *Roper v. Simmons*. But most recently, on March 28, the U.S. Supreme Court heard oral arguments in a case that will consider whether foreign nationals duly convicted of the most heinous crimes will nevertheless be entitled to a new trial for reasons that those individuals did not even bother to bring up during their trial. As in the previous examples, the Supreme Court has already answered this issue but decided to revisit it once again. In 1998, in *Breard v. Green*, the Court made clear that criminal defendants, like all parties in lawsuits, may not sit on their rights and must bring them up at the time the case is going on or be prohibited from raising those issues later on,

perhaps even years later. That is a basic principle of our legal system. In this case, the Court has decided to revisit whether an accused who happens to be a foreign national, subject to the Vienna Convention on Consular Relations, should be treated differently from any other litigant in our civil litigation systems and in State and Federal courts or in the Federal system reviewing State criminal justice provisions.

Even this basic principle of American law may soon be reversed. Many legal experts predict that in the upcoming case of *Medilline v. Dretke*, the Court may overturn itself again for no other reason than that the International Court of Justice happens to disagree with our longstanding laws and legal principles. This particular case involves the State of Texas. I have filed an amicus brief, a friend of the court brief, in that decision, asking the Court to allow the people of Texas to determine their own criminal laws and policies consistent with the U.S. States Constitution and not subject to the veto of the Vienna Convention on Consular Rights or the decision of some international court.

There is a serious risk, however, that the Court will ignore Texas law, will ignore U.S. law, will reverse itself, and decide in effect that the decisions of the U.S. Supreme Court can be overruled by the International Court of Justice.

I won’t dwell on this any longer, but suffice it to say there are other examples and other decisions where we see Supreme Court Justices citing legal opinions from foreign courts across the globe as part of the justification for their decisions interpreting the U.S. Constitution. These decisions, these legal opinions from foreign courts range from countries such as India, Jamaica, Zimbabwe, and the list goes on and on.

I am concerned about this trend. Step by step, with each case where this occurs, the American people may be losing their ability to determine what their laws should be, losing control in part due to the opinions of foreign courts and foreign governments. If this happens to criminal law, it can also spread to other areas of our Government and our sovereignty. How about our economic policy, foreign policy? How about our decisions about our own security?

Most Americans would be disturbed if we gave foreign governments the power to tell us what our Constitution means. Our Founding Fathers fought the Revolutionary War precisely to stop foreign governments—in this case, Great Britain—from telling us what our laws should be or what the rules should be by which we would be governed. In fact, ending foreign control over American law was one of the very reasons given for our War of Independence.

The Declaration of Independence itself specifically complains that the American Revolution was justified in